Message

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Subject: Inside EPA: OIG Rejects EPA Plan To Bypass Air Toxics Risk Review For Key Pollutants

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OIG Rejects EPA Plan To Bypass Air Toxics Risk Review For Key Pollutants

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EPA's Office of Inspector General (OIG) is again attacking EPA's air office for its refusal to commit to fresh risk-and-technology reviews (RTRs) of air toxics rules for industries emitting the solvent ethylene oxide (EtO) and the rubber component chloroprene, rejecting a recent effort at compromise by acting agency air chief Joe Goffman.

In an Aug. 5 letter to Goffman, Inspector General Sean O'Donnell says "based on the information and supporting documentation provided, we do not agree with the Agency's planned corrective actions" that would respond to an earlier OIG report on the issue.

"The Agency commits to developing an internal control process, but does not commit to developing specific criteria to determine whether and when new residual risk reviews will be needed when new risk information demonstrates higher toxicity than previously determined," O'Donnell writes.

The OIG therefore considers the matter "unresolved," O'Donnell says, urging Goffman to pursue the agency's formal dispute resolution process that could see the issue elevated to Administrator Michael Regan for a decision.

RTRs are required under the Clean Air Act (CAA) eight years after EPA first issues a national emissions standards for hazardous air pollutants (NESHAP) rule for an industry sector.

EPA has viewed the "residual risk" review as a one-time occurrence, and the related technology review as recurring every eight years. Under an RTR, if EPA finds remaining unacceptable health risks, or new, cost-effective control technologies, it must tighten the standards.

In 2016, EPA adopted a risk assessment for EtO under its Integrated Risk Information System (IRIS) program that found EtO to be much more carcinogenic than previously thought, triggering concern around the country at sites located near EtO-emitting facilities, such as medical equipment sterilizers. Similarly, in 2010, IRIS finalized a risk assessment that classified chloroprene as a likely human carcinogen, a finding that raised concerns at a chemical manufacturing facility in Louisiana.

In its May 6 report, which kick-started this dispute, OIG urged EPA to reconsider air toxics risks in relevant NESHAPs.

But Goffman rejected the recommendation, criticizing it as too prescriptive. Instead, he agreed for the agency to conduct such a review in the context of the recurring technology review -- not a fresh residual risk review.

The acting air chief suggested that EPA will address EtO risks in "statutorily required" technology reviews, and merely consider "whether the Agency should conduct a discretionary residual risk review" during such rulemakings. The OIG "appears to be directing EPA to use a specific statutory authority for rulemaking; however, there are other authorities that could be equally effective at addressing the problem," Goffman said.

EPA at the time released a tentative timetable of technology reviews for affected sectors, still subject to negotiation with environmental groups seeking tougher rules.

Under that schedule, EPA would release technology review rules for Commercial Sterilizers in Quarter 4 fiscal year 2022; Hospital Sterilizers in Q4, FY23; Group 1 Polymers and Resins (Neoprene) in Q2, FY24; Synthetic Organic Chemicals Manufacturing Industry in Q 2, FY24; and Polyether Polyols Production in Q4, FY24.

Goffman's stance drew criticism from environmentalists and some lawmakers, who pressed Regan to conduct the risk reviews for EtO that the OIG had urged.

Internal Changes

Goffman subsequently sent a July 7 letter to OIG that lists a number of internal changes EPA has made under its air toxics strategy to "identify and efficiently address new and emerging air toxics issues," including "strategic engagement" of EPA staff, program offices, regional offices and stakeholders.

"Through communication, coordination, and collaboration with others at EPA and outside of EPA, members of the Air Toxics Evaluation and Screening Team (ATEST) actively monitor for new and emerging issues," Goffman writes.

But Goffman again pushes back on the OIG's specific directive to conduct new residual risk reviews for the various sectors under section 112(f)(2) of the air law.

"[W]e note that the CAA provides more than one authority that EPA can use to reduce risks to public health by establishing emission standards for hazardous air pollutants. We understand OIG's request that [the Office of Air Quality Planning and Standards] undertake risk reviews of these source categories under CAA section 112(f)(2), and in light of the CAA's multiple options to review risk, we are expeditiously evaluating the benefits and contraindications for each of these options to reduce risk from these source categories, with the aim of making an informed decision of the holistically best regulatory option to use," Goffman writes.

He sketches out several "roadmaps" for possible tightening of specific NESHAPs, which might in some circumstances include discretionary residual risk review.

Goffman also notes that there is an adverse legal precedent on EPA's authority to conduct a fresh section 112(f)(2) residual risk review. "The claim that we must redo a section 112(f)(2) risk review has been litigated in a . . . district court for a different source category, and that court ruled that the CAA does not require a second residual risk review" he says, citing the 2020 ruling of the U.S. District Court for the Northern District of California in *Citizens for Pennsylvania's Future, et al. v. Wheeler*.

Goffman sketches out a possible approach for its commercial sterilizers rulemaking, which has already found high health risks. EPA will seek to plug previously unregulated emissions in the sector under the CAA section 112(d)(6) technology review.

EPA could also establish "a cost effectiveness benchmark for ethylene oxide that ensures standards established pursuant to the technology review of existing standards is sufficiently stringent to address the severity of risk attendant to exposure to ethylene oxide."

Currently, "there is no cost-effectiveness benchmark established for ethylene oxide, and decisions under this technology review regarding what represents a cost-effective value for ethylene oxide will establish precedent for other upcoming rules. EPA would consider risk acceptability criteria in establishing the cost-effectiveness value with the expectation that such an approach would allow us to achieve the necessary risk reductions." This appears to be a novel approach.

Otherwise, EPA could conduct a fresh section 112(f)(2) residual risk review "followed by further evaluation of measures to provide" the "ample margin of safety" required by the air law.

Finally, Goffman rejects the OIG's recommendation for small "area" sources of air toxics, which are subject to generally available control technology (GACT), a less-stringent standard than the maximum achievable control technology required of "major" sources.

"EPA notes that the CAA does not direct EPA to conduct a residual risk assessment for generally available control technology (GACT) standards. More importantly, because technology-based standards for ethylene oxide have not yet been established for the [chemical manufacturing] source category, it is premature to determine that a risk review is warranted," Goffman writes.

But the OIG is pressing for new risk reviews of specific sectors, and for EPA to revise the relevant NESHAPs "as needed."

Sectors listed by the OIG include: Group I polymers and resins that cover neoprene production; synthetic organic chemical manufacturing industry; polyether polyols production; and commercial sterilizers.

Also, the OIG calls for EPA to revise NESHAPs for chemical manufacturing area sources to regulate ethylene oxide and conduct a residual risk review "to ensure that the public is not exposed to unacceptable risks." But Goffman in his July 7 letter to the OIG commits to none of these things, O'Donnell says. -- *Stuart Parker* (sparker@iwpnews.com)